IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant	: Stefan Kiefer, et al.	Art Unit	: 3625
Serial No.	: 10/695,621	Examiner	: Mark A. Fadok
Filed	: October 28, 2003	Conf. No.	: 3903
Title	: COMPLEX PRICES IN BIDDING		

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BRIEF ON APPEAL

This Appeal Brief perfects the Notice of Appeal filed in the U.S. Patent and Trademark Office on December 7, 2009.

(1) Real Party in Interest

This case is assigned of record to SAP AKTIENGESELLSCHAFT, who is the real party in interest.

(2) Related Appeals and Interferences

There are no known related appeals and/or interferences.

(3) Status of Claims

Claims 1-12 and 16-20 are withdrawn.

Claims 13-15 and 21-31 are pending.

Claims 13-15 and 21-31 are under consideration.

Claims 13-15 and 21-31 stand rejected.

Claims 1, 13, and 28 are in independent form.

(4) Status of Amendments

The advisory action dated September 10, 2009, indicated that Applicants' amendments after the final office action would **not** be entered for appeal. Applicants submitted these amendments for the respective independent claims 1 and 28 based on the Examiner's suggestion

in the final office action. There, the Examiner had indicated that the claims at issue would satisfy the section 101 requirements if Applicants replaced the expressions "at a computer system" and "with the computer system" with the expressions "in a computer system" and "in the computer system." *See* Final office action p. 3.

Thus, for independent claim 28 Applicants submitted an after-final amendment as suggested by the Examiner. *See* Amendment in reply to action of June 5, 2009. The advisory action indicated that the amendment would not be entered but also stated regarding section 101 that "a new rejection is not deemed necessary." *See* Advisory action. Applicants understand the Examiner's position to be that the amendment of claim 28 will not be entered for the appeal but that the amendment is sufficient to overcome the rejection under section 101. As such, Applicant is not addressing the section 101 rejection of claim 28 in this appeal.

For independent claim 1, in contrast, the Examiner now acknowledges that this claim was included in the section 101 rejection by mistake, and that the Examiner meant to reject independent claim 13 instead. *See* Advisory action. In any event, claim 1 has been withdrawn earlier in response to a restriction requirement and is not involved in the present appeal. As such, the non-entry of the amendment of claim 1 is not an issue for this appeal.

In conclusion, on appeal the claims 13-15 and 21-31 read as they did before Applicants submitted the non-entered amendment in reply to the action of June 5, 2009. The appealed claims are included in the appendix below.

(5) Summary of Claimed Subject Matter

The subject matter of the claims relates generally to managing bid pricing information, such as managing a bidding process including contracts having complex pricing information. (Spec. [0007]). Such contracts can include form contracts or term sheet information which may be adjusted or supplemented to produce a bid invitation that may be sent to potential bidders on a project. (Spec. [0026]).

Independent claim 13 is directed to a computer-implemented method of managing bid pricing information. The method recites steps of "receiving at a computer system transaction information and item data from a buyer," "generating with the computer system a bid invitation containing entries relating to the transaction information and item data, and making the bid

invitation available to a plurality of potential bidders," and "receiving, at the computer system, from one or more of the potential bidders bid responses containing a complex pricing structure and corresponding complex pricing amounts, wherein the complex pricing structure is selected by the potential bidders from among a group of multiple pricing structures made available to the potential bidders." Regarding the first "receiving" step, claim 13 recites that it receives "at a computer system transaction information and item data from a buyer." For example, a bidding process involving complex pricing in FIG. 4 and computer systems for carrying out the bidding process are shown in FIG. 2. Examples of "receiving transaction information and item data from a buyer" are shown in FIG. 7 (e.g., transaction data is depicted as bidder information and status and item data is depicted as item descriptions and quantities). (Spec. [0057]).

Regarding the "generating" step, claim 13 recites a "bid invitation containing entries relating to transaction information and item data." For example, the specification recites "form contract 12 or term sheet 14 information may be adjusted or supplemented to produce a bid invitation that may be sent to potential bidders on a project." (Spec. [0026]). The entries relating to transaction information and item data are described in FIG. 1 as pricing entries which "could represent, for example, a particular time period within the term of a contract, or particular supply levels where higher levels can be obtained at lower prices." (Spec. [0029]). The time period within the term of a contract pertains to transaction information and supply levels pertain to item data.

Regarding the second "receiving" step, claim 13 recites that it receives "potential bidders bid responses containing a complex pricing structure and corresponding complex pricing amounts." For example, FIG. 7 shows a submit bid button and a possibility to "add your own notes" to the bid. The potential bidder "may be provided with the option to present pricing information in a complex pricing structure." (Spec. [0057]). Claim 13 recites that "the complex pricing structure is selected and supplied by each potential bidder." For example, "the complex pricing structures 18, 20, 22, and 24 may be a common scenario that is shared by multiple different bidders…multiple complex scenarios could be presented to bidders." (Spec. [0030]). In addition, "each bidder may formulate their own complex pricing scenario 16 for a bid and submit it in a preferred manner." (Spec. [0027]). Claim 13 recites that "the complex pricing structures supplied by two or more potential bidders include bids with multiple different pricing

amounts, and each bidder provides multiple different proposals with each proposal including a set of terms governing the proposal and a set of prices for the proposal." For example, a bidder can be provided with "multiple options for certain provisions in a supply agreement." (*Id.*). In another example, a "buyer may have previously selected possible alternative complex pricing structures to be made available to the bidders…bidders may be given the flexibility to choose a pricing structure that relates well to their own business and pricing structures." (Spec. [0050]).

Claim 13 recites a step of "selecting a winning bidder based at least in part on the complex pricing amounts." For example, the process may include selecting a "winning bidder as the lowest priced bid from among those that meet the minimum requirements." (Spec. [0053]). In another example, a "bid aggregator and selector 78 may in particular provide for analysis of the pricing terms of a bid…the system can estimate demand over time and plug values for the demand complex pricing scenario received from each bidder, and then compare the costs of the various bids. The results of the comparison may be used, for example, to select the highest rated bidder." (Spec. [0045]).

Independent claim 28 is directed to "a computer-implemented method of managing bid pricing information." The method recites steps of "receiving, in a computer system, transaction information regarding an item on which an owner of the item seeks bids," "generating, in the computer system, a bid invitation including the information regarding the item, and making the bid invitation available to a plurality of potential bidders," "receiving, from a first bidder, a plurality of bid proposals for an item, where each bid proposal is arranged to be separately accepted by the buyer and is characterized by a set of prices and a set of terms supplied by the buyer and corresponding to the set of prices."

Regarding the first "receiving" step, claim 28 recites "receiving, in a computer system, transaction information regarding an item on which an owner of the item seeks bids." For example, FIG. 1 shows the "formation and provision of a bid invitation by a buyer" which takes place in computer systems for carrying out the bidding process shown in FIG. 2. (Spec. [0025]) Further, the "bid invitation may include information concerning the products or services sought to be procured, and the expected required quantity of each." (Spec. [0026]).

Regarding the "generating" step, claim 28 recites "generating, in the computer system, a bid invitation including the information regarding the item, and making the bid invitation

available to a plurality of potential bidders," For example, FIG. 1 shows the "formation and provision of a bid invitation by a buyer" which takes place in computer systems for carrying out the bidding process shown in FIG. 2. (Spec. [0025]). Further, the "form contract 12 or term sheet 14 information may be adjusted or supplemented to produce a bid invitation that may be sent to potential bidders on a project" and each "bid invitation may include information concerning the products or services sought to be procured, and the expected required quantity of each." (Spec. [0026]).

Regarding the second "receiving" step, claim 28 recites "receiving, from a first bidder, a plurality of bid proposals for an item." For example, the method includes receiving from a bidder scales such as offering "a 5% discount on quantities up to 1000 pieces, and a 10% discount on quantities over 1000 pieces where the 5% and 10% figures are pricing values associated with the pricing structure." (Spec. [0028]) Claim 28 also recites "where each bid proposal is arranged to be separately accepted by the buyer and is characterized by a set of prices and a set of terms supplied by the buyer and corresponding to the set of prices." For example, each bid proposal can be "date-based" in which "a bidder can offer one price or set of prices for the first three months of an agreement, and a different price or set of prices for subsequent three-month periods." (*Id.*). Thus, "the bidder can maintain future effective dates that are automatically considered in purchasing transactions." (*Id.*).

Regarding the "selecting" step, claim 28 recites a step of "selecting in the computer system a winning bidder based on the pricing sets and corresponding term sets." In one example, the specification recites "a bid invitation may be generated so as to create multiple options for certain terms or provisions…bidders may be provided with several options by which they can choose to ship products under the contract, wherein some options are more expensive than others. The bidders may then select one of the options with the understanding that it might help or hurt their chance of winning the bid. In this example, "a scoring system may be constructed by which various terms have an assigned importance relative to other terms, and the values that are bid for each term may be normalized so as to provide a convenient mechanism to evaluate the bids." (Spec. [0041]). Regarding selection of a winning bidder based on the pricing sets and corresponding term sets, particular selection criteria "for selecting one pricing scenario over another may be formulated, and those criteria may be used by the system to select a 'best' price

bid automatically. The desirability of a particular bidder's pricing may also be compared with other bid terms provided by particular bidders in deciding which bidder to select in moving forward. (Spec. [0031]).

(6) Grounds of Rejection to be Reviewed on Appeal

Whether claims 13-15 and 21-31 are unpatentable under 35 U.S.C. § 103 over U.S. 20060149653 (Davis) in view of U.S. 20030191672 (Kendall) and the Examiner's purported "official notice"?

(7) Argument

Applicants respectfully request that the Board reverse the section 103 rejection, which is deficient and otherwise improper for multiple reasons.

Initially, Applicants note that the final office action contradicts itself regarding what claims are actually rejected under section 103 and what the Examiner relies on as the basis for the rejection. First, the rejection under section 103 states that claims "13-15 and 21,23-31" are rejected. *See* Final office action p. 3. However, the final office action also addresses dependent claim 22 in the subsequent discussion of Davis and Kendall. *See id.* at pp. 6-7. Accordingly, Applicants will assume that dependent claim 22 was included in the rejection.

Second, the final office action states on page 5 that the rejection under section 103 is based on "Davis et al … in view of Kendal [sic] et al," but the Examiner later invokes official notice already in the analysis regarding independent claim 13. *See id.* at p. 5. Then, the Examiner states that each of subsequent claims 14-15 and 21-31 is rendered unpatentable by "the combination of Davis, Official Notice and Kendall." *See id.* at pp. 6-9. Applicants assume that the Examiner intended to mention the official notice also when stating the rejection on page 5.

Lack of merits in the section 103 rejection

The section 103 rejection is improper because even the proposed combination of Davis, Kendall and the official notice does not render the present claims unpatentable. The official notice, moreover, is not proper in the present situation and is so unclear that, at best, it merely reflects the Examiner's misunderstanding of the present claims.

I. The Examiner acknowledges that Davis in view of Kendall falls short of the present claims.

Starting with independent claim 13, this claim is directed to a computer-implemented method of managing bid pricing information, and it recites, among other operations, "receiving … bid responses containing a complex pricing structure and corresponding complex pricing amounts." The claim also recites, in so-called "wherein" clauses after the receiving operation, features of the complex pricing structure and the complex pricing amounts, and sums up the description of the complex pricing structure and the complex pricing amounts by stating that "each bidder provides ***multiple different proposals*** with each proposal including a set of terms governing the proposal and a set of prices for the proposal."[1] Independent claim 28, in turn, is also directed to a computer-implemented method and states that "a plurality of bid proposals for an item" are received, in which "each bid proposal is arranged to be separately accepted by the buyer." Thus, a bidder submits either a complex pricing structure and complex pricing amounts (claim 13), or a plurality of bid proposals arranged to be separately accepted (claim 28).

Neither of these claim phrases is a mere technicality or trivial feature. Indeed, the title of the present application is "***Complex Prices*** in Bidding," and already in the first paragraph the application mentions "systems and methods for permitting the use of ***complex pricing scenarios*** in computer-controlled bidding systems and processes." *See* Spec. [0001]. Moreover, the present specification indicates how complex pricing structures can create a more competitive bidding process:

> the buyers system, upon receiving a complex bid from one bidder may ***post the pricing structure of the bid*** (but may hide the values of the bid) to make it available to other bidders ***so that they can more closely match their bids*** with the bids of other bidders; and
>
> the system may provide the bidder with examples of general complex pricing schemes, and may even ***allow the bidder to select a particular complex pricing structure***.

[1] Emphasis is added unless otherwise noted.

See Spec. at [0030] & [0050]. Accordingly, the complex pricing structures are something that individual bidders choose between, making the process more flexible and competitive.

Against this background, it is fair to say that the feature in claim 13 of a bid response with a complex pricing structure and complex pricing amounts—particularly such that the bidder provides multiple different proposals—is a central portion of claim 13. One might have expected, perhaps, that if a rejection under section 103 be made against such a claim, the rejection would rely on a main reference that indeed teaches the feature of a bidder's "multiple different proposals" in claim 13 (or, for that matter, the feature of bid proposals "arranged to be separately accepted" in claim 28).

Not so. In fact, the Examiner did the exact opposite. In the rejection of claim 13, most of the claim is said to be shown by the main reference Davis, ***except*** the very feature of the multiple different proposals from the bidder. Then, when Davis' disclosure comes up short at this precise juncture, the Examiner simply says that another reference, Kendall, fills the gap (and Applicants discuss this flawed reading of Kendall below). Finally, when also the highly selective and arbitrary choice of adding Kendall fails to suffice, the Examiner grasps for official notice. For the present claims, a more conspicuous case of hindsight reasoning can hardly be imagined.

That is, the final office action improperly performs a part-by-part analysis of the claims instead of determining whether the claimed invention as a whole would have been obvious to one of ordinary skill in the art at the time of invention. *See, e.g., Ruiz v. A.B. Chance Company*, 357 F.3d 1270, 1275 (Fed. Cir. 2004) (holding that "section 103 specifically requires consideration of the claimed invention 'as a whole' ... [and] the 'as a whole' instruction in title 35 prevents evaluation of the invention part by part").[2] The Examiner here conveniently uses the

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[2] For instance, the court in *Ruiz* gave the following illustrative example of the "as a whole" requirement:

> Without this important requirement, an obviousness assessment might break an invention into its component parts (A + B + C), then find a prior art reference containing A, another containing B, and another containing C, and on that basis alone declare the invention obvious. This form of hindsight reasoning, using the invention as a roadmap to find its prior art components, would discount the value of combining various existing features or principles in a new way to achieve a new result - often the very definition of invention.

Id. The present Examiner's approach mirrors the improper one described in *Ruiz*. Indeed, the Supreme Court has confirmed that "a patent composed of several elements is ***not*** proved obvious ***merely by demonstrating*** that each of its elements was, independently, known in the prior art." *KSR Intern. Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007).

claims as a roadmap to patch together Davis and Kendall, in an unvarnished example of the hindsight reasoning that the courts routinely criticize.

Turning now to the substance of the cited references, Applicants note that the Examiner's reliance on Davis suffers from at least one misunderstanding that should dispose of the entire rejection. When addressing Applicants' claim feature that "a group of multiple pricing structures [is] made available to the potential bidders," the Examiner says that Davis teaches the following:

> para 0026, pricing from different locations is provided to the buyer, each location has a different structure.

See Final office action at p. 4. The Examiner makes this statement again in rejecting claim 28. *See id.* at p. 8. Davis, however, mentions location only ***once*** in paragraph 0026, in the last statement thereof, which is ungrammatical and does not form a complete sentence:

> Shipping locations may also appear if the buyer desires quotes to be delivered pricing

See Davis at [0026]. Earlier in the same paragraph Davis mentions a "quote view page," and it is possible, but by no means clear, that the quoted portion of Davis should be understood so that "shipping locations" are to appear on the quote view page. But even if it is assumed, for the sake of argument, that this is how a person of ordinary skill in the art would interpret Davis' paragraph 0026,[3] the shipping location in Davis remains a choice tied to the buyer. That is, Davis' buyers can specify shipping locations if they want to receive bids tailored for delivery at specific locations, but the ***bidders*** do not choose between locations when submitting a quote. For this reason, Davis simply does not disclose bidder selection between "a group of multiple pricing structures made available to the potential bidders."

The Examiner is also mistaken about Kendall. The Examiner relies on Kendall as supposedly teaching "sending in multiple proposals for a single bid," as the Examiner phrases it. *See* Final office action p. 5. In reality, Kendall describes that:

> Soliciting, rating and pricing these life insurance and annuity policy proposals are conducted in an ***iterative process***. This process is preferably ***conducted in real-time***

[3] *See, e.g., Akzo N.V. v. U.S. Int'l Trade Comm'n,* 808 F.2d 1471, 1479 (Fed. Cir. 1986) (affirming a "finding that the prior art reference did not disclose, to one of ordinary skill in the art, the process … described in claim 13").

> and continues until optimal product pricing and product ratings have been obtained. Although ***each insurance*** carrier can make ***one proposal at a time***, multiple proposals can also be made by each carrier to generate multiple ratings with multiple prices.

See Kendall at [0083]. Here, Kendall describes that each insurance carrier makes "one proposal at a time," but because the "iterative process" is "conducted in real-time," the bidder can also make multiple proposals to generate multiple ratings with multiple prices. Kendall does not describe, however, that a bidder can submit multiple different proposals "for a single bid."

The section 103 rejection is based on the above misunderstandings of Davis or Kendall and should therefore be reversed.

II. The "official notice" is not warranted in this situation.

In the final office action, the Examiner took "official notice" that

> providing a proposal with terms that include process that vary over time for setting up a long term contract proposal where the prices escalate over time was old and well known in the art at the time of the invention.

See Final office action p. 5. However, MPEP section 2144.03 cautions that rejections based on official notice should only be "judiciously applied." This is because the reviewer on appeal should "construe it narrowly and will regard facts found in such manner with an eye toward narrowing the scope of any conclusions to be drawn therefrom." *In re Ahlert*, 424 F.2d 1088, 1091 (C.C.P.A. 1970). Indeed, "technical facts in areas of esoteric technology must always be supported by citation to some reference work recognized as standard in the pertinent art." *Id.* Official notice may properly be taken only "of facts beyond the record which, while not generally notorious, are capable of ***such instant and unquestionable demonstration as to defy dispute***." *Id.*

An illustrative decision is *In re Zurko*, 258 F.3d 1379 (Fed. Cir. 2001). There, the issue related to whether the Board of Patent Appeals and Interferences could sustain a rejection based on sweeping generalizations such as "it is basic knowledge that …" and unsupported conclusions that performing a certain function is "nothing more than good common sense." *Id.* at 1385-86.

The Federal Circuit said no, and emphasized that the Board "cannot simply reach conclusions based on its own understanding … [but] must point to some concrete evidence in the record." *Id.*

Here, the Examiner's official notice does not pass muster under the applicable standard as articulated in *Zurko*, *Ahlert* and the MPEP. First, it is unclear from the final office action what facts the Examiner seeks to encompass by the official notice. For example, the beginning of the official notice—"providing a proposal with terms that include process that vary over time"—is incomprehensible, and as a result the official notice fails to define what the Examiner asserts to be well known in the art. That is, the official notice cannot be fully understood and is therefore improper. *See, e.g.,* MPEP 2144.04(C); 37 CFR 1.104(c)(2); *see also* Zurko, 258 F.3d at 1386 (stating that "the Board [or examiner] must point to some concrete evidence in the record in support of these findings" to satisfy the substantial evidence test); *Chester v. Miller*, 906 F. 2d 1574, 1578 (Fed. Cir. 1990) (stating that a rejection violates section 132 if it "is so uninformative that it prevents the applicant from recognizing and seeking to counter the grounds for rejection").

Second, other portions of the above quote indicate that the official notice simply falls way outside the narrow range of facts where such notice is permitted. For example, the official notice says that "providing a proposal with terms … that vary over time for setting up a long term contract proposal where the prices escalate over time was old and well known in the art at the time of the invention." The mere length and complexity of the quoted language demonstrates that it is not susceptible to "instant and unquestionable demonstration," let alone with such persuasion "as to defy dispute."

The official notice taken in the final office action is improper and should be withdrawn.

III. The "official notice" is based on the Examiner's misunderstanding that the claim feature "a set of prices for the proposal" means prices that "escalate over time".

Even if one assumes that the official notice is somehow justified, it nevertheless misses the intended target by a far margin. Here, the Examiner appears to have invoked the official notice while discussing the claim terms "a set of prices for the proposal." *See* Final office action p. 5. Per the claim language itself, the recited "prices" are part of the bidder's "complex pricing amounts." Moreover, each of the "bid responses" received in the claim corresponds to a bidder

submitting "multiple different proposals," wherein each proposal "includ[es] a set of terms governing the proposal ***and a set of prices*** for the proposal." The official notice of prices that "escalate over time," in contrast, if anything merely corresponds to multiple prices for a single proposal, not to a set of prices for each of "multiple different proposals" or to a set of prices for a "plurality of bid proposals … arranged to be separately accepted." That is, the official notice never purported to cover "a set of prices" for "each proposal," wherein the bidder makes "multiple different proposals" in a "bid response[]," as recited in the present claim 13. The official notice therefore fails to provide the subject matter of claim 13 that the Examiner acknowledged was missing in Davis and Kendall. Claim 13 and its dependent claims are therefore patentable over the cited references despite the "official notice." For similar reasons, independent claim 28 and its dependent claims are also patentable.

Conclusion

The rejection of all pending claims should be reversed, and the pending claims are patentable over the references of record.

The brief fee of $540 is enclosed. Please apply any other charges or credits to Deposit Account No. 06-1050.

Respectfully submitted,

Date:April 15, 2010_____

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Appendix of Claims

13. A computer-implemented method of managing bid pricing information, comprising:

receiving at a computer system transaction information and item data from a buyer;

generating with the computer system a bid invitation containing entries relating to the transaction information and item data, and making the bid invitation available to a plurality of potential bidders;

receiving, at the computer system, from one or more of the potential bidders bid responses containing a complex pricing structure and corresponding complex pricing amounts, wherein the complex pricing structure is selected by the potential bidders from among a group of multiple pricing structures made available to the potential bidders, and

wherein the complex pricing structure is selected and supplied by each potential bidder, and the complex pricing structures supplied by two or more potential bidders include bids with multiple different pricing amounts, and each bidder provides multiple different proposals with each proposal including a set of terms governing the proposal and a set of prices for the proposal; and

selecting a winning bidder based at least in part on the complex pricing amounts.

14. The method of claim 13, wherein a complex pricing structure from a first bidder is made available for review by other potential bidders.

15. The method of claim 14, wherein complex pricing amounts from a first bidder are made available for review by other potential bidders.

21. The method of claim 13, wherein the complex pricing structure comprises date-based pricing information.

22. The method of claim 13, wherein the bid response from a first bidder of the plurality of bidders contains multiple bid prices for a particular item, with each bid price being associated with different terms identified and specified by the bidder.

23. The method of claim 22, further comprising providing the different bid terms from the first bidder, but not the bid prices, to the plurality of bidders other than the first bidder, and seeking bid prices from the plurality of bidders other than the first bidder for the different bid terms.

24. The method of claim 22, wherein the different terms and the bid prices correspond to geographic location-specific information.

25. The method of claim 13, wherein the multiple different pricing amounts comprise multiple prices from a particular bidder for a particular bid item.

26. The method of claim 13, further comprising aggregating bids received from the plurality of bidders when a bidding period has ended.

27. The method of claim 26, further comprising normalizing prices of the aggregated bids to permit comparison among differing bids.

28. A computer-implemented method of managing bid pricing information, comprising:

receiving, at a computer system, transaction information regarding an item on which an owner of the item seeks bids;

generating, at a computer system, a bid invitation including the information regarding the item, and making the bid invitation available to a plurality of potential bidders;

receiving, from a first bidder, a plurality of bid proposals for an item, where each bid proposal is arranged to be separately accepted by the buyer and is characterized by a set of prices and a set of terms supplied by the buyer and corresponding to the set of prices; and

selecting with the computer system a winning bidder based on the pricing sets and corresponding term sets.

29. The method of claim 28, further comprising making the terms of the bid response received from the first bidder, available to other of the potential bidders, and receiving prices from at least some of the other potential bidders.

30. The method of claim 29, further comprising concealing from the other potential bidders the prices bid by the first bidder.

31. The method of claim 29, further comprising aggregating the bid prices for bids from different sellers that have common terms to permit comparison among different bids.

Evidence Appendix

NONE

Related Proceedings Appendix

NONE